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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/732,726	12/10/2003	**William T. Ball**	5564-152	2017

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SHERIDAN ROSS PC
1560 BROADWAY
SUITE 1200
DENVER, CO 80202

EXAMINER	
FETSUGA, ROBERT M	
ART UNIT	**PAPER NUMBER**
3751	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/732,726	BALL, WILLIAM T.	
	Examiner	Art Unit	
	Robert M. Fetsuga	3751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *02/06/2009, 05/19/2009 & 06/09/2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *11-23* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *11-23* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *02/06/2009, 05/19/2009*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

1. The proposed amendment to the specification and the proposed drawing correction to Fig. 8, both filed June 09, 2009, do not comply with Rule 121 and therefore cannot be entered. The specification amendments do not include the required markings, and the drawing correction contains a newly added sheet which is not designated as such as required. The examiner has no authority to waive the requirements of Rule 121. Applicant is reminded the proposed drawing correction filed on August 26, 2005 was disapproved, which means the immediate prior version of the drawings is that filed December 10, 2003 regarding Figs. 1-5 and 7, and that filed June 09, 2009 regarding Fig. 6.

Applicant is advised the proposed drawing correction to Fig. 8 filed June 09, 2009 would still be considered as containing new matter. Two thin diaphragms/membranes 80/26A are defined in step 110. The "physically cutting" open of the membrane 26A as apparently described in step 116 is not originally disclosed. The examiner agrees with applicant's argument at page 9 of the response filed June 09, 2009 that one skilled in the art would find it obvious to cut open the membrane 26A. However, it is the examiner's understanding that "new matter" should not be equated with obviousness as applicant

portrays, but rather, should be equated with anticipation/inherency.

2. The amendment filed August 26, 2005 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: The paragraph added to page 9, beginning at line 25, where Fig. 8 is discussed. The description of the "physically cutting" subject matter associated with the membrane 26A is not found in the originally filed disclosure.

Applicant is required to cancel the new matter in the reply to this Office Action.

3. The disclosure is objected to because of the following informalities: In the amendment filed August 26, 2005 to page 7, line 10, at lines 4, 12 and 14 of the amendment, "10" apparently should be --20--, and at line 14 of the amendment, "12" apparently should be --26--; and page 7, line 29, "10" apparently should be --20--. Appropriate correction is required.

4. Claims 11, 14, 16, 21 and 23 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to

particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 11 is unclear as to whether the "bathtub" is intended to be part of the claimed combination since the bathtub is only set forth as environment in the claim preamble, but is also structurally defined in the claim body (lns. 5-6, 11-12 and 15). Claims 14, 16, 21 and 23 are similarly indefinite.

Applicant argues at pages 10-11 of the response the use of "adapted to" language in claim 11 makes it clear that the bathtub is not part of the claimed invention. This argument appears misplaced. None of the noted lines in claim 11 (previously lns. 5, 10 and 13) recite "adapted to" language. Rather, in the noted lines of claim 11, the structure of the plumbing system, which is injected into the body of the claim, is also positively and physically associated with the bathtub. Furthermore, there is no "adapted to" language anywhere in claims 14, 16 or 23, and claim 21 at line 10 positively and physically associates the overflow assembly with the bathtub. Applicant's argument is unpersuasive. Applicant argues at page 11 of the response that use of the word "the" in place of the word "said" when referring to the bathtub in claim 11 makes it clear that the bathtub is intended to be excluded from the claim. However, it is the examiner's understanding that the two

words are equivalent in patent claim parlance. Applicant's argument is unpersuasive.

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless -
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claims 21-23, 11, 12 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over CH 346187 and Fritz et al. '531. Fritz et al. '531 (Fritz) qualifies as prior art under Statute 102(e).

The CH 346187 (Gebert) reference discloses an overflow assembly comprising (using claim 21 nomenclature): an overflow pipe 1 including an upper end (at 4) and a lower end 2; an elbow 3; a lip 5; a nut element 8 including a lug 11; a bathtub including a wall 7; and a cap 14. Therefore, Gebert teaches all elements set forth in claims 21, 22, 11 and 12 except for the provision of fluid flow preventing means.

Although the upper end of the Gebert overflow assembly does not include fluid flow preventing means, as claimed, attention is directed to the Fritz reference which discloses an analogous overflow assembly which further includes an upper end 21 having fluid flow preventing means in the form of a diaphragm 15/76. Therefore, in consideration of Fritz, it would have been obvious to one of ordinary skill in the overflow assembly art to associate a diaphragm with the upper end of Gebert in order to facilitate hydraulic testing (col. 1 lns. 49-52). Re claim 22, the diaphragm taught by Fritz is removable (col. 4 lns. 38-41).

Re claim 23, although the upper end of the Gebert overflow assembly does not include a washer, as claimed, attention is again directed to Fritz which discloses a washer 16. Therefore, in further consideration of Fritz, it would have been obvious to one of ordinary skill in the overflow assembly art to associate

a washer with the upper end of the Gebert overflow assembly in order to provide a better seal.

Applicant argues at page 12 of the response the adapter plate (sic, ring) 10 of Gebert does not possess the lugs required by claims 11 and 21. However, this argument is more narrow than the actual claim language. Only one lug is positively recited in claims 11 and 21. And, the nut element 8 in Gebert can be portrayed as "comprising at least one lug (11) extending radially from the nut element" (language of claim 21, numeral from Gebert added). Indeed, the nut element 8 and ring 10 of Gebert cooperate "to secure said the overflow pipe to the end of the bathtub" as recited in claim 21. Claim 11 is similarly worded. It is further noted that even though the terms of claims 21 and 11 are met by only one lug, Gebert contemplates a plurality thereof as disclosed in the second full paragraph on page 4 of the English language translation. Applicant's argument is unpersuasive. Applicant argues at pages 12-13 of the response the Fritz reference should be removed as prior art relative to the instant application in light of the Rule 131 declarations filed June 09, 2009. The examiner disagrees. The declarations of Bill Carlson and William T. Ball have been fully considered, but are not supported by sufficient facts to establish conception of the claimed invention prior to

the effective date of the Fritz disclosure. Both of the noted declarations rely upon the same engineering drawings, denoted Exhibits A and B, as factual evidence of conception. However, only the drawing labeled "WATCO OVERFLOW ELBOW PROTOTYPE" and designated "Fig. 4", as found in Exhibit B (last page), discloses an overflow pipe with a membrane for preventing fluid flow. The date on that drawing is "2/9/2000" which is after the December 01, 1999 filing date of Fritz. Therefore, the declarations do not establish conception of the claimed invention prior to February 02, 2000. See MPEP 715.02 and 715.07.

7. Claims 13 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gebert and Fritz as applied to claims 11 and 12 above, and further in view of Ball '241.

Re claim 13, Ball '241 teaches the obvious use of a cutting instrument to remove an overflow testing diaphragm (col. 3 lns. 2-5). Re claim 15, Ball '241 further teaches the common provision of a pipe 42 and vent pipe 40 (Fig. 2) associated with an overflow assembly.

Applicant has not substantively argued this ground of rejection beyond that addressed supra.

8. Claims 16-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gebert and Fritz as applied to claim 11 above, and further in view of Ball '931 and Ball '241.

Although the Gebert bathtub plumbing system may not include a drain pipe, lock washer and drain closure, as claimed, attention is directed to the Ball '931 reference which discloses an analogous bathtub plumbing system which further includes a drain pipe, lock washer and drain closure (col. 1 lns. 8-24). Therefore, in consideration of Ball '931, it would have been obvious to one of ordinary skill in the bathtub plumbing system art to associate a drain pipe, lock washer and drain closure with the Gebert bathtub plumbing system as being a common type of bathtub plumbing system. Furthermore, Ball '241 teaches plugging the drain port of a bathtub plumbing system during hydraulic testing "in any convenient manner" (col. 2 lns. 59-60), and further teaches use of a (thin) diaphragm 64 to accomplish such plugging (col. 2 lns. 37-40 and col. 2 ln. 65 thru col. 3 ln. 13).

Applicant has not substantively argued this ground of rejection beyond that addressed supra.

9. Applicant is referred to MPEP 714.02 and 608.01(o) in responding to this Office action.

10. The grounds of rejection have been reconsidered in light of applicant's arguments, but are still deemed to be proper.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

11. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 571/272-4886 who can be most easily reached Monday through Thursday. The Office central fax number is 571/273-8300.

/Robert M. Fetsuga/
Robert M. Fetsuga
Primary Examiner
Art Unit 3751